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# In the Supreme Court of the United States

MARK J. SHERIFF, SARAH SHERIFF, WILES, BOYLE, BURKHOLDER & BRINGARDNER CO., LPA, AND MICHAEL DEWINE, ATTORNEY GENERAL OF OHIO,

*Petitioners,*

v.

PAMELA GILLIE AND HAZEL MEADOWS,

*Respondents.*

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

MICHAEL DEWINE
Attorney General of Ohio
ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor
SAMUEL C. PETERSON
PETER T. REED
Deputy Solicitors
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov
*Counsel for Petitioner Michael DeWine, Attorney General of Ohio*

MICHAEL L. CLOSE
MARK LANDES
DALE D. COOK
Isaac Wiles Burkholder & Teetor
Two Miranova Place
Suite 700
Columbus, Ohio 43215
*Counsel for Petitioners Wiles, Boyle, Burkholder & Bringardner, LPA, Mark Sheriff and Sarah Sheriff*

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With this alleged class action under the Fair Debt Collection Practices Act ("Act"), Plaintiffs Pamela Gillie and Hazel Meadows seek to impose substantial liability on special counsel for the Ohio Attorney General. They do so merely because special counsel used Attorney General letterhead to show that they acted on behalf of the Attorney General when collecting debts owed to Ohio—as the Attorney General's Office has long *required* them to do. Over dissents at the en banc and panel stages, the Sixth Circuit reinstated Plaintiffs' suit. It held (1) that special counsel do not meet the Act's exemption for state "officers" under 15 U.S.C. § 1692a(6)(C), and (2) that a jury could find their use of state letterhead "misleading" under 15 U.S.C. § 1692e. Pet. App. 28a-54a.

As the Petition detailed (at 15-35), both holdings warrant review. *First*, the Sixth Circuit's broad rule that independent contractors cannot be state "officers" conflicts with the Court's clear-statement cases, with its cases interpreting 42 U.S.C. § 1983, and with the most analogous circuit case. *Second*, the Sixth Circuit's holding that a jury could find special counsel's use of state letterhead misleading exacerbates an existing circuit disagreement. *Third*, these issues are important, and the Sixth Circuit resolved them in a way that undermines federalism, that unfairly leaves debt collectors in the dark on the Act's liability standards, and that does not even further the Act's consumer-protection purposes.

In response, Plaintiffs argue initially that these issues are unimportant and then that the decision below comports with relevant cases from this Court and from the circuit courts. They are mistaken.

## I. PLAINTIFFS FAIL TO MINIMIZE THE IMPORTANCE OF THE QUESTIONS PRESENTED

As the Petition illustrated, the Court should grant review because the two questions presented are important. Pet. 29-35. The Sixth Circuit's decision "trench[es] on [Ohio's] arrangements for conducting" a sovereign duty. *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004). And the decision implicates all of the reasons why this Court routinely "correct[s] lower courts when they wrongly subject individual officers to liability." *City and Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015); *Filarsky v. Delia*, 132 S. Ct. 1657, 1665-67 (2012). Plaintiffs say nothing to alleviate these concerns.

A. While conceding that Ohio's debt collection "is serious business" (Opp. 8), Plaintiffs nevertheless argue that this case has no federalism implications because they sued special counsel. That is mistaken for both questions presented.

Starting with the first question, Plaintiffs suggest that the Sixth Circuit's holding does not undermine federalism *both* because they sued independent contractors chosen "from the marketplace" *and* because those contractors undertake the mundane task of collecting debts. Opp. 2-3, 8-9. They are doubly wrong.

*Filarsky* shows that federalism concerns can arise from suits against contractors. The *Filarsky* plaintiff could just as easily claimed that the government had chosen a lawyer from the marketplace to handle an employment matter—like any business might. *See* 132 S. Ct. at 1660-61. But this Court recognized that the concerns with imposing liability on state employees extended to contractors performing state func-

tions. *Id.* at 1665-67 That concern is magnified here; special counsel have served the Attorney General since the creation of that office. *See* Pet. 4-6.

Plaintiffs also wrongly suggest that debt collection does not involve a sovereign act. As the Petition noted (at 1-4), States have long viewed their debt-collection prerogatives as aspects of their sovereignty. While Plaintiffs ridicule the Petition's reliance on some older authorities (Opp. 8), they nowhere challenge a central principle from those authorities—that the clear-statement rule may have *originated* in this very public-debt context. *See Anon.*, 1 Atk. 262, 262, 26 Eng. Rep. 167, 167 (Ch. 1745).

Turning to the second question, Plaintiffs suggest that their fraud allegations challenge *only* decisions by private parties. Opp. 2, 10. Yet those claims attack the methods the *State* has chosen to collect debts. After all, it was the General Assembly that required special counsel to use state letterhead for tax debts, Ohio Rev. Code § 109.08, and the Attorney General who extended that directive to all public debts, Doc.24, Answer, PageID#292. So Plaintiffs put *Ohio* to the choice between restructuring its "arrangements for conducting" debt collection or permitting special counsel to face perpetual liability. *Nixon*, 541 U.S. at 140.

In their federalism discussion, Plaintiffs also suggest that special counsel seek "sovereign immunity." Opp. 8-9. Not so. The Petition raises statutory, not constitutional, questions. Thus, Plaintiffs' cited cases holding that the Constitution did not grant sovereign immunity to certain entities offer no guidance about the meaning of "officer" in § 1692a(6)(C) or of "misleading" in § 1692e.

B. Apart from federalism, Plaintiffs find "irony" in the Attorney General "tout[ing] consumer protectionism" while arguing that the Act does not reach special counsel's use of state letterhead. Opp. 11. There is nothing "ironic" about the need to balance consumer protection and fair collection. The Act itself recognizes the need to *both* eliminate abusive practices *and* protect "debt collectors who refrain from using" them. 15 U.S.C. § 1692(e).

In that respect, Plaintiffs ignore the Petition's reasons why the Sixth Circuit's decision disserves *both* goals. Pet. 30-35. As for consumer protection, the Sixth Circuit's directive that special counsel use private letterhead could lead debtors to "assume that the letter does *not* concern a state debt." Pet. App. 9a (Sutton, J., dissenting). This could be problematic because state law prioritizes state debts. Pet. 32-33. Further, state letterhead shows special counsel's connection to the Attorney General's Office; debtors who do not know that connection might not know to report abuse. As for conscientious debt collectors, the Sixth Circuit's decision could expose special counsel to "liability coming and going" if a plaintiff found private letterhead misleading. Pet. App. 9a (Sutton, J., dissenting). And because the Act authorizes damages and attorney's fees without proof of injury, a lower court's legal errors about the Act's scope are especially in need of correction. *Cf. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 617-18 (2010) (Kennedy, J., dissenting).

C. Plaintiffs lastly suggest that the questions presented are unimportant because they "involve[] activity that is generally localized to" special counsel. Opp. 3. Yet the multi-state *amicus* brief shows the

broader concern with the way in which the Sixth Circuit approached this case. And, as the sheer number of circuit decisions shows, there has been a "'proliferation of litigation'" under the least-sophisticated-consumer standard. *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 513 (6th Cir. 2007) (citation omitted). Regardless, Plaintiffs themselves allege that "several *million* individuals received the types of" letters that they challenge in this case. *Id.* (emphasis added). Plaintiffs' own measure of the stakes fully justifies the Court's intervention.

## II. PLAINTIFFS CANNOT RECONCILE THE SIXTH CIRCUIT'S HOLDING THAT SPECIAL COUNSEL ARE NOT "OFFICERS" WITH THE CASELAW

The Sixth Circuit's holding that special counsel are not state "officers" under § 1692a(6)(C) conflicts with (1) the Court's clear-statement cases, (2) its § 1983 cases, and (3) *Heredia v. Green*, 667 F.2d 392 (3d Cir. 1981). Plaintiffs' responses fail.

### A. Plaintiffs Fail To Reconcile The Decision Below With The Clear-Statement Rule

As the Petition showed (at 15-18), the Sixth Circuit's holding conflicts with this Court's cases construing federal law not to intrude on important state interests unless Congress speaks *clearly*. *Bond v. United States*, 134 S. Ct. 2077, 2088-89 (2014); *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). Plaintiffs' efforts to avoid these cases lack merit.

*First*, Plaintiffs argue that the clear-statement cases do not apply because the Act's exemption *unambiguously* excludes independent contractors. Opp. 7, 13. Yet Plaintiffs do not even cite the relevant definition of "officer"—"any person authorized by law to

perform the duties of the office." 1 U.S.C. § 1. As the Petition noted (at 15), that definition covers special counsel—who, like assistant attorneys general, fall within the unclassified civil service of the State—because Ohio law gives the Attorney General the *duty* to collect debts and *authorizes* special counsel to represent the State in this duty. Ohio Rev. Code §§ 109.08, 124.11(A)(11), 131.02. Further, Plaintiffs themselves asserted below that "'[t]he term "officer" is ambiguous' and 'open to multiple, yet reasonable interpretations.'" Pet. App. 60a (Sutton, J., dissenting) (citation omitted). Now recognizing that the clear-statement rule requires the Court to read this ambiguity in the State's favor, Plaintiffs say the term is unambiguous. This about-face speaks volumes about whether the definition unambiguously excludes special counsel.

*Second*, Plaintiffs fall back on the Sixth Circuit's holding that the clear-statement cases do not apply because this suit does "not involve questions concerning the regulation of Ohio or the structure of Ohio's government." Opp. 12. They ignore the reasons why that holding is inaccurate and irrelevant. Pet. 16-18. It is inaccurate because this case challenges how the State engages in a sovereign act. *Nixon*, 541 U.S. at 140. It is irrelevant because this Court applies the clear-statement rule to more than just laws regulating States. *Bond*, 134 S. Ct. at 2081.

*Third*, Plaintiffs invoke a competing canon—"that exemptions to broad remedial statutes are to be read narrowly." Opp. 9-10, 14. But "that canon does not trump the *Gregory* clear-statement rule because *Gregory* itself involved a remedial statute, the Age Discrimination in Employment Act." Pet. App. 60a

(Sutton, J., dissenting). Like *Gregory*, other cases have relied on the clear-statement rule for statutes that might be called "remedial." *Sossamon v. Texas*, 131 S. Ct. 1651, 1661 (2011) (Religious Land Use and Institutionalized Persons Act); *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) (Education of the Handicapped Act). This is unsurprising because the remedial-statute canon has been roundly criticized, *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* §§ 63-64 (2012), whereas the clear-statement rule has roots in the Constitution, *Gregory*, 501 U.S. at 457-61.

*Fourth*, Plaintiffs cite the Act's preemption provision. Opp. 12-13 (quoting 15 U.S.C. § 1692n). They fail to explain how it sheds light on the meaning of "officer." If Plaintiffs are arguing that a preemption provision renders the clear-statement rule inoperable, this Court's cases say otherwise. *Nixon*, 541 U.S. at 140-41 (invoking clear-statement rule for preemption provision); *Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 437-39 (2002) (same).

### B. Plaintiffs Ignore The Key Insight From This Court's § 1983 Cases

The Petition illustrated that the Sixth Circuit's decision conflicted with this Court's § 1983 cases, which show that there is nothing unusual about federal law treating some independent contractors as "officers." Pet. 18-21.

Plaintiffs respond that this Court's § 1983 cases established immunities in a "common law" fashion because § 1983 contains *no* immunities, whereas the Act "contains specific self-contained exemptions" and so is not open to this common-law approach. Opp.

15-18. They miss the point of this analogy. The Petition did not seek to incorporate § 1983's immunities into the Act; it sought to deduce the meaning of the Act's "officer" exception. On that question, the § 1983 cases show that courts have viewed contractors as "officers" when they performed government functions. *Filarsky*, 132 S. Ct. at 1662-65.

Plaintiffs' argument also gets things backward. That the clear-statement rule led the Court to adopt § 1983's immunities even though the "statute on its face does not provide for *any* immunities" offers powerful support for special counsel. *Malley v. Briggs*, 475 U.S. 335, 342 (1986). If a statute devoid of immunities can be construed to afford immunities to contractors performing government duties, a statute's generous exception can be read to extend to those parties. Plaintiffs, by contrast, suggest that if Congress intended to incorporate *more* exemptions into the Act, it would have included *fewer*.

### C. Plaintiffs Fail To Distinguish *Heredia*

As the Petition detailed (at 21-23), the Third Circuit in *Heredia*, "the only circuit to confront an analogous" situation, has rejected the Sixth Circuit's approach. Pet. App. 69a (Sutton, J., dissenting). Plaintiffs mistakenly distinguish *Heredia* while invoking cases that do not share its concerns. Opp. 19-23.

1. Plaintiffs cite three facts to distinguish *Heredia*. Opp. 20. None suffices.

Fact One: Plaintiffs say the debts in *Heredia* were owed to private landlords, not the State. Opp. 20. Far from reconciling *Heredia*, this confirms the conflict. It makes no sense to read § 1692a(6)(C) as exempting individuals collecting debts owed to *pri-*

*vate parties*, but not individuals collecting debts owed to *the government*.

Fact Two: Plaintiffs say that Landlord and Tenant Officers were not independent contractors. Opp. 20. Yet they point to nothing in *Heredia* suggesting that it turned on the officers' employment status. *See* 667 F.2d at 393. And Plaintiffs ignore the evidence suggesting that Landlord and Tenant Officers may have been independent contractors; the constables that they replaced had been so. *In re Act 147 of 1990*, 598 A.2d 985, 986 (Pa. 1991).

Fact Three: Plaintiffs say that the Landlord and Tenant Officers' conduct in sending the letters was "strongly regulated" by the *President Judge*. Opp. 20. Yet special counsel also used state letterhead at the directive of the *Attorney General*. Pet. App. 24a.

In sum, if the Act excludes special counsel authorized to collect *state* debts by *state law*, it also must exclude Landlord and Tenant Officers authorized to collect *private* debts by an *official's order*.

2. Plaintiffs argue that the Sixth Circuit's decision follows from *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379 (3d Cir. 2000), and *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260 (9th Cir. 1996). Opp. 20-23. That is mistaken.

As a specific matter, Plaintiffs dispute the Petition's claim that *Pollice* involved debt collection for *private parties*. Opp. 21-22. Yet *Pollice* expressly noted that the "government entities [there] decided to sell the claims" to a private party. 225 F.3d at 385. Plaintiffs also make much of the government entities' retention of *servicing* rights for the debts. Opp. 21-22. But the sale of the debts "eliminat[ed]

the possibility that the collector was somehow an officer of the government in collecting the debt *for the government*." Pet. App. 60a (Sutton, J., dissenting). Turning to *Brannan*, Plaintiffs argue that special counsel are similar to the private guaranty agency collecting on student loans. Opp. 22-23. They likewise ignore that, in *Brannan*, "the collector and not the government owned the debt in the first place." Pet. App. 60a (Sutton, J., dissenting).

More broadly, unlike special counsel who are authorized by state law to undertake an official duty of the Attorney General's Office, the guaranty agency in *Brannan* and the servicer in *Pollice* failed to identify any law that made debt collection a duty of some government office and that authorized those entities to undertake that duty for the office. Simply because special counsel here are officers does not mean that *all* independent contractors will be. Many will not meet the statutory requirements for "officer" status.

## III. Plaintiffs Ignore The Circuit Disagreements Over How To Determine Whether A Statement Is Materially Misleading

As the Petition lastly explained (23-28), the Court should review whether special counsel's use of state letterhead was a "false, deceptive, or misleading representation" under 15 U.S.C. § 1692e. This Court's lack of guidance on § 1692e has led circuit courts to adopt conflicting tests for assessing whether debtors would find a statement misleading: the "least sophisticated consumer" test and the "unsophisticated consumer" test. While some courts have questioned how much room separates these tests, the circuit courts have applied them in ways that illustrate concrete disagreement. Plaintiffs' responses lack merit.

*First*, Plaintiffs assert that the failure to raise this issue until the *en banc* stage at the Sixth Circuit shows its lack of importance. Opp. 24. Yet the Sixth Circuit had previously picked sides in the debate. *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 400 (6th Cir. 1998) (adopting least-sophisticated-consumer test). So the *en banc* stage was the *earliest* opportunity to raise the issue. *See Cooper v. MRM Inv. Co.*, 367 F.3d 493, 507 (6th Cir. 2004); *cf. Medimmune v. Genetech, Inc.*, 549 U.S. 118, 125 (2007) (failing to raise issue more fully below "merely reflect[ed] counsel's sound assessment that the argument would be futile" at the circuit level).

*Second*, Plaintiffs quote from a decision suggesting that "'there appears to be little difference between'" these tests. Opp. 24 (quoting *Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 103 n.4 (1st Cir. 2014)). Yet they ignore the Petition's explanation why, in practice, real disagreement exists. Pet. 25-28. They, for example, nowhere reconcile the Seventh Circuit's view that a plaintiff must prove—generally through a consumer survey—that a representation would mislead "'a significant fraction of the population,'" *Durkin v. Equifax Check Servs., Inc.*, 406 F.3d 410, 415 (7th Cir. 2005) (citation omitted), with the other circuits' objective approaches tied solely to judicial review of a communication's four corners, *Russell v. Equifax A.R.S.*, 74 F.3d 30, 33-36 (2d Cir. 1996). Nor do Plaintiffs confront the circuit debate about when letterhead could confuse a debtor—notwithstanding clarifications below that letterhead. *Compare Lesher v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993, 997-1003 (3d Cir. 2011); *Gonzalez v. Kay*, 577 F.3d 600, 604-07 (5th Cir. 2009); *with Lesher*, 650 F.3d at 1004-07 (Jordan, J., dissent-

ing); *Gonzalez*, 577 F.3d at 607-09 (Jolly, J., dissenting); *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360, 365 (2d Cir. 2005). The vigorous debate in the decision below added to this disagreement.

At day's end, the Sixth Circuit's decision itself best illustrates the need for the Court's guidance on what qualifies as a materially misleading communication. As the en banc dissent noted: "How these letters could be misleading is beyond me." Pet. App. 8a (Sutton, J., dissenting). That court's opaque misleading standards risk "align[ing] the judicial system with those who would use litigation to enrich themselves at the expense of attorneys who strictly follow and adhere to professional and ethical standards." *Jerman*, 559 U.S. at 612 (Kennedy, J., dissenting).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio
ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor
SAMUEL C. PETERSON
PETER T. REED
Deputy Solicitors
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov
*Counsel for Petitioner Michael DeWine, Attorney General of Ohio*

MICHAEL L. CLOSE
MARK LANDES
DALE D. COOK
Isaac Wiles Burkholder
& Teetor
Two Miranova Place,
Suite 700
Columbus, Ohio 43215

*Counsel for Petitioners Wiles, Boyle, Burkholder & Bringardner, LPA, Mark Sheriff and Sarah Sheriff*

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